

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION**

JUAN JAY MAYES,

Petitioner,

v.

HILTON HALL; and HOMER BRYSON,

Respondents.

CIVIL ACTION NO.: 5:17-cv-21

ORDER and MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter comes before the Court on Petitioner's failure to pay the filing fee associated with this action and failure to comply with the Clerk of Court's directive regarding the same. (Doc. 2.) Because Petitioner has not submitted a filing fee or moved to proceed *in forma pauperis*, I **RECOMMEND** that the Court **DISMISS** Petitioner's Petition, (doc. 1), **without prejudice** for his failure to follow this Court's Orders and failure to prosecute. I further **RECOMMEND** that the Court **DENY** Petitioner a certificate of appealability and **DENY** him leave to appeal *in forma pauperis*.

BACKGROUND

Petitioner, an inmate at Core Civic Solutions in Nicholls, Georgia, brought this action pursuant to 28 U.S.C. § 2254 on February 3, 2017. (Doc. 1.) However, he did not provide the requisite filing fee or file an application to proceed *in forma pauperis*. The Clerk of Court issued a Notice regarding Petitioner's failure to pay the filing fee. (Doc. 2.) In that Notice, the Clerk stated, "You must either pay the filing fee or submit a properly completed 'Motion to Proceed In

Forma Pauperis’ within 21 days from the date of this notice.” (Id.) The Notice further advised Petitioner that if he did not comply with its directive, the Court may dismiss his case. (Id.) The Court mailed that Notice to Petitioner at the most recent address it has for him. The Court received no information indicating this Notice did not reach Petitioner or was otherwise undeliverable to Petitioner. However, Petitioner has not provided the filing fee or a motion to proceed *in forma pauperis*, and the Court has not received any pleading from Petitioner since that Notice.

DISCUSSION

The Court must now determine how to address Petitioner’s failure to comply with this Court’s directive and his failure to prosecute this case. For the reasons set forth below, I recommend that the Court dismiss the Petition and deny Petitioner a certificate of appealability and leave to appeal *in forma pauperis*.

I. Dismissal for Failure to Prosecute and Failure to Follow this Court’s Order.

A district court may dismiss a petitioner’s claims *sua sponte* pursuant to either Federal Rule of Civil Procedure 41(b) (“Rule 41(b)”) or the court’s inherent authority to manage its docket. Link v. Wabash Railroad Company, 370 U.S. 626 (1962);¹ Coleman v. St. Lucie Cty. Jail, 433 F. App’x 716, 718 (11th Cir. 2011) (citing Fed. R. Civ. P. 41(b) and Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1337 (11th Cir. 2005)). In particular, Rule 41(b) allows for the involuntary dismissal of a petitioner’s claims where he has failed to prosecute those claims, comply with the Federal Rules of Civil Procedure or local rules, or follow a court order.

¹ In Wabash, the Court held that a trial court may dismiss an action for failure to prosecute “even without affording notice of its intention to do so.” 370 U.S. at 633. Nonetheless, here, the Court provided notice to Petitioner that his Petition could be dismissed.

Fed. R. Civ. P. 41(b); see also Coleman, 433 F. App'x at 718; Sanders v. Barrett, No. 05-12660, 2005 WL 2640979, at *1 (11th Cir. Oct. 17, 2005) (citing Kilgo v. Ricks, 983 F.2d 189, 192 (11th Cir. 1993)); cf. Local R. 41.1(b) (“[T]he assigned Judge may, after notice to counsel of record, sua sponte . . . dismiss any action for want of prosecution, with or without prejudice[,] . . . [based on] willful disobedience or neglect of any order of the Court.” (emphasis omitted)). Additionally, a district court’s “power to dismiss is an inherent aspect of its authority to enforce its orders and ensure prompt disposition of lawsuits.” Brown v. Tallahassee Police Dep’t, 205 F. App'x 802, 802 (11th Cir. 2006) (quoting Jones v. Graham, 709 F.2d 1457, 1458 (11th Cir. 1983)).

It is true that dismissal with prejudice for failure to prosecute is a “sanction . . . to be utilized only in extreme situations” and requires that a court “(1) conclud[e] a clear record of delay or willful contempt exists; and (2) mak[e] an implicit or explicit finding that lesser sanctions would not suffice.” Thomas v. Montgomery Cty. Bd. of Educ., 170 F. App'x 623, 625–26 (11th Cir. 2006) (quoting Morewitz v. West of Eng. Ship Owners Mut. Prot. & Indem. Ass’n (Lux.), 62 F.3d 1356, 1366 (11th Cir. 1995)); see also Taylor v. Spaziano, 251 F. App'x 616, 619 (11th Cir. 2007) (citing Morewitz, 62 F.3d at 1366). By contrast, dismissal without prejudice for failure to prosecute is not an adjudication on the merits, and, therefore, courts are afforded greater discretion in dismissing claims in this manner. Taylor, 251 F. App'x at 619; see also Coleman, 433 F. App'x at 719; Brown, 205 F. App'x at 802–03.

While the Court exercises its discretion to dismiss cases with caution, dismissal of this action without prejudice is warranted. See Coleman, 433 F. App'x at 719 (upholding dismissal without prejudice for failure to prosecute Section 1983 complaint, where plaintiff did not

respond to court order to supply defendant's current address for purpose of service); Taylor, 251 F. App'x at 620–21 (upholding dismissal without prejudice for failure to prosecute, because plaintiffs insisted on going forward with deficient amended complaint rather than complying, or seeking an extension of time to comply, with court's order to file second amended complaint); Brown, 205 F. App'x at 802–03 (upholding dismissal without prejudice for failure to prosecute, where plaintiff failed to follow court order to file amended complaint and court had informed plaintiff that noncompliance could lead to dismissal). With Petitioner having failed to provide the Court with a filing fee or a motion to proceed *in forma pauperis*, the Court has no means to collect the filing fees in this case or to assess Petitioner's eligibility for *in forma pauperis* status. Furthermore, with Petitioner not having taken any action in this case following the Court's Notice, he has failed to follow this Court's Order and to diligently prosecute his claims. Thus, Petitioner has demonstrated a clear record of delay and disregard for this Court's Orders, and a sanction other than dismissal would not suffice to remedy his deficiencies.

For these reasons, the Court should **DISMISS** the Petition, (doc. 1), **without prejudice** for failure to prosecute and failure to follow this Court's Order, and **CLOSE** this case.

II. Denial of Leave to Appeal *in Forma Pauperis* and Certificate of Appealability.

The Court should also deny Petitioner leave to appeal *in forma pauperis*, and deny a Certificate of Appealability ("COA"). Though Petitioner has, of course, not yet filed a notice of appeal, it would be appropriate to address these issues in the Court's order of dismissal. Rule 11 of the Rules Governing Section 2254 cases provides that the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." See also Thomas v. Crosby, 371 F.3d 782, 797 (11th Cir. 2004) (Tjoflat, J., specially concurring) ("A

district court may *sua sponte* grant or deny a COA at the same time it rules on the merits of a habeas petition or rejects it on procedural grounds. This is arguably the best time for a district judge to decide this matter because the issues are still fresh in [the district court's] mind.”); Alexander v. Johnson, 211 F.3d 895, 898 (5th Cir. 2000) (approving *sua sponte* denial of COA before movant filed a notice of appeal); Fed. R. App. P. 24(a)(3) (trial court may certify that appeal is not taken in good faith “before or after the notice of appeal is filed”).

An appeal cannot be taken *in forma pauperis* if the trial court certifies, either before or after the notice of appeal is filed, that the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3). Good faith in this context must be judged by an objective standard. Busch v. Cty. of Volusia, 189 F.R.D. 687, 691 (M.D. Fla. 1999). A party does not proceed in good faith when he seeks to advance a frivolous claim or argument. See Coppedge v. United States, 369 U.S. 438, 445 (1962). A claim or argument is frivolous when it appears the factual allegations are clearly baseless or the legal theories are indisputably meritless. Neitzke v. Williams, 490 U.S. 319, 327 (1989); Carroll v. Gross, 984 F.2d 392, 393 (11th Cir. 1993). Or, stated another way, an *in forma pauperis* action is frivolous and, thus, not brought in good faith, if it is “without arguable merit either in law or fact.” Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002); see also Brown v. United States, Nos. 407CV085, 403CR001, 2009 WL 307872, at *1–2 (S.D. Ga. Feb. 9, 2009).

Additionally, under 28 U.S.C. § 2253(c)(1), an appeal cannot be taken from a final order in a habeas proceeding unless a certificate of appealability is issued. A certificate of appealability may issue only if the applicant makes a substantial showing of a denial of a constitutional right. The decision to issue a certificate of appealability requires “an overview of

the claims in the habeas petition and a general assessment of their merits.” Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). In order to obtain a certificate of appealability, a petitioner must show “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” Id. “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also Franklin v. Hightower, 215 F.3d 1196, 1199 (11th Cir. 2000). “This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.” Miller-El, 537 U.S. at 336.

Based on the above analysis of Petitioner’s action and applying the certificate of appealability standards set forth above, I discern no issues worthy of a certificate of appeal, and, therefore, the Court should **DENY** the issuance of a certificate. Furthermore, as there are no non-frivolous issues to raise on appeal, an appeal would not be taken in good faith. Thus, the Court should, likewise, **DENY** Petitioner *in forma pauperis* status on appeal.

CONCLUSION

For the above-stated reasons, I **RECOMMEND** that the Court **DISMISS** this action, without prejudice, and that the Court **DIRECT** the Clerk of Court to enter the appropriate judgment of dismissal and to **CLOSE** this case. I further recommend that the Court **DENY** Petitioner a certificate of appealability and **DENY** him leave to proceed *in forma pauperis* on appeal.

The Court **ORDERS** any party seeking to object to this Report and Recommendation to file specific written objections within **fourteen (14) days** of the date on which this Report and Recommendation is entered. Any objections asserting that the Magistrate Judge failed to address any contention raised in the pleading must also be included. Failure to do so will bar any later challenge or review of the factual findings or legal conclusions of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140 (1985). A copy of the objections must be served upon all other parties to the action. The filing of objections is not a proper vehicle through which to make new allegations or present additional evidence.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge will make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the Magistrate Judge. Objections not meeting the specificity requirement set out above will not be considered by a District Judge. A party may not appeal a Magistrate Judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a District Judge. The Court **DIRECTS** the Clerk of Court to serve a copy of this Report and Recommendation upon Petitioner.

SO ORDERED and **REPORTED** and **RECOMMENDED**, this 22nd day of March, 2017.



R. STAN BAKER
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA